

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

RICHARD T. POWELL

Plaintiff,

vs.

CIVIL ACTION

No. 99-3161-GTV

**WYANDOTTE COUNTY
DETENTION CENTER, et al.,**

Defendants.

MEMORANDUM AND ORDER

Pro se Plaintiff, Richard T. Powell, brings this action pursuant to 42 U.S.C. § 1983 against Defendants, Anita Tucker, J.B. Hopkins, and Michael Dailey, alleging that Defendants subjected him to cruel and unusual punishment while he was a pre-trial detainee at the Wyandotte County Detention Center.¹ The case is before the court on Defendants' motion to dismiss or, in the alternative, for summary judgment (Doc. 19). For the reasons set forth below, Defendants' motion is granted.

I. MOTION TO DISMISS STANDARD

As noted, Defendants have moved to dismiss Plaintiff's claims pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted, or, in the alternative, for summary judgment pursuant to Fed. R. Civ. P. 56. After reviewing Plaintiff's complaint and the

¹ The Wyandotte County Detention Center was originally a named Defendant in this case, but was dismissed as an improper Defendant by Order dated April 27, 2000 (Doc. 14).

parties' submissions on Defendants' motion, the court concludes that it need only consider Defendants' motion under the Rule 12(b)(6) motion to dismiss standard.

A Rule 12(b)(6) motion to dismiss will be granted only if it appears beyond a doubt that the plaintiff is unable to prove any set of facts entitling him to relief under his theory of recovery. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). "All well-pleaded facts, as distinguished from conclusory allegations, must be taken as true." Swanson v. Bixler, 750 F.2d 810, 813 (10th Cir.1984) (citation omitted). The court must view all reasonable inferences in favor of the plaintiff, and the pleadings must be liberally construed. Id. (citation omitted). The issue in reviewing the sufficiency of a complaint is not whether the plaintiff will prevail, but whether the plaintiff is entitled to offer evidence to support his claims. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds by Harlow v. Fitzgerald, 457 U.S. 800 (1982).

Because Plaintiff is proceeding *pro se*, the court affords him more leniency in construing his complaint. Asselin v. Shawnee Mission Med. Ctr., Inc., 894 F. Supp. 1479, 1484 (D. Kan. 1995) (citation omitted). The court may not, however, assume the role of advocate for Plaintiff simply because he is proceeding *pro se*. Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991). Although not required to precisely state each and every element of his claim, Plaintiff must at least advance minimal factual allegations on the material elements of his claim to survive a Rule 12(b)(6) motion to dismiss. Miller v. Brungardt, 904 F. Supp. 1215, 1217 (D. Kan. 1995) (citing Hall, 935 F.2d at 1110).

II. FACTUAL BACKGROUND

Plaintiff, an inmate currently imprisoned by the Kansas Department of Corrections, was

detained in 1998 at the Wyandotte County Detention Center while awaiting trial on various criminal charges. At that time, Defendant Turner was a Sheriff's Deputy working at the detention center, Defendant Hopkins was the Administrator of the detention center, and Defendant Dailey was the Wyandotte County Sheriff.

Plaintiff alleges that during his period of confinement at the detention center, he was attacked by other detainees on three separate occasions. Plaintiff first alleges that on February 9, 1998, Lester Mitchell and members of his "42nd Street Crip Gang" attacked and injured him. Mr. Mitchell and his cohorts were acquaintances of the victim in Plaintiff's criminal case, "Mims," and Mr. Mitchell was the brother-in-law of Deputy Sheriff Harden, another deputy working at the detention center. Deputy Harden is not a Defendant in this action.

The next alleged incident occurred on July 10, 1998, when one of "Mims's" family members attacked and injured Plaintiff while he was being escorted to the detention center's nurse's station by Defendant Tucker. Plaintiff contends that Defendant Tucker failed to protect him by: (1) not instructing the attacking inmate to stay at least ten feet away from them while Plaintiff was in handcuffs and shackles; (2) not spraying the attacking inmate with mace; and (3) just standing there "as if she was in shock" while the attacking inmate continued to kick and hit Plaintiff.

The final alleged incident occurred on December 30, 1998 when fifteen or more inmates attacked Plaintiff when he exited his cell to go to lunch.

Plaintiff contends in his complaint that Defendant Hopkins, as Administrator of the detention center, failed to protect his safety by continuing to place him in "pods" with inmates that

had already caused him bodily harm.

Plaintiff's complaint contains no allegations involving Defendant Dailey.

III. DISCUSSION

Section 1983 permits an individual to pursue an action against any person who "under color of any statute, ordinance, regulation, custom, or usage," deprives the plaintiff of "any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. Here, Plaintiff contends that Defendants violated his constitutional rights by failing to take reasonable measures to protect him from other detainees in the Wyandotte County Detention Center.

The court recognizes at the outset that at the time of the alleged violations, Plaintiff was a pretrial detainee, i.e., a person who had been charged with a crime but who had not yet been tried on the charge. Berry v. City of Muskogee, 900 F.2d 1489, 1493 (10th Cir. 1990) (citations omitted). Inmates who have already been charged with and adjudged guilty of a crime are protected by the Eighth Amendment, but pretrial detainees are protected by the Due Process Clause of the Fourteenth Amendment. Lopez v. LeMaster, 172 F.3d 756, 759 n.2 (10th Cir. 1999) (citing Bell v. Wolfish, 441 U.S. 520, 535 n.16 (1979)). The distinction is primarily one of formality, however, because to determine whether a pretrial detainee's rights have been violated under the Fourteenth Amendment, the court applies an analysis identical to that applied in Eighth Amendment cases. Id. (citing Hare v. City of Corinth, 74 F.3d 633, 643 (5th Cir. 1996)).

While prison officials cannot absolutely guarantee the safety of their prisoners, the Eighth Amendment imposes a duty upon them to take reasonable measures to ensure their safety. Id. at 759 (citations omitted). This duty includes the duty to protect prisoners from suffering harm at

the hands of other prisoners. Farmer v. Brennan, 511 U.S. 825, 833 (1994) (citations omitted). To state a cognizable claim for failure to protect, a plaintiff must allege that: (1) he was incarcerated under conditions posing a substantial risk of serious harm to his safety; and (2) the defendants acted with deliberate indifference to that substantial risk, i.e., they knew of and disregarded the substantial risk of serious harm. Id. at 834, 837. “[D]eliberate indifference describes a state of mind more blameworthy than negligence,” and “liability requires ‘more than ordinary lack of due care for the prisoner’s interests or safety.’” Id. at 835 (citations omitted). Deliberate indifference requires actual knowledge of the risk to the prisoner’s safety. Id. at 837.

In addition, “[i]ndividual liability under § 1983 must be based on personal involvement in the alleged constitutional violation.” Foote v. Spiegel, 118 F.3d 1416, 1423 (10th Cir. 1997) (citation omitted). Plaintiffs must allege facts that tend to “establish a connection or a link between the alleged misconduct and constitutional violations [of] any of the defendants.” Aston v. Cunningham, No. 99-4156, 2000 WL 796086, at *4 (10th Cir. June 21, 2000).

A. Deputy Tucker

The only allegation that involves Defendant Tucker’s personal participation is that on July 10, 1998, one of “Mims’s” family members attacked and injured Plaintiff while Defendant Tucker escorted him to the detention center’s nurse’s station. Plaintiff alleges in his complaint that Defendant Tucker failed to protect him by: (1) not instructing the attacking inmate to stay at least ten feet away from them while Plaintiff was in handcuffs and shackles; (2) not spraying the attacking inmate with mace; and (3) just standing there “as if she was in shock” while the attacking inmate continued to kick and hit Plaintiff. Plaintiff’s allegations are insufficient to show

deliberate indifference by Defendant Tucker. Nowhere in his complaint does Plaintiff allege that Defendant Tucker had actual knowledge that the attacking inmate posed a substantial risk of serious harm to Plaintiff. In fact, Plaintiff's allegation that Defendant Tucker stood there "as if she was in shock" is contrary to the suggestion that she possessed such knowledge. Moreover, Plaintiff repeatedly asserts in his response to Defendants' motion to dismiss that Tucker's actions were "negligent." As noted, the deliberate indifference standard is not satisfied by allegations of mere negligence. Farmer, 511 U.S. at 835. Therefore, the court concludes that Plaintiff has failed to state a claim against Defendant Tucker.

B. Administrator Hopkins

Plaintiff alleges that Defendant Hopkins failed to protect his safety by continuing to place him in "pods" with inmates that had already caused him bodily harm. As was the case with Defendant Tucker, however, Plaintiff fails to allege that Defendant Hopkins had actual knowledge that any of the attacking inmates posed a substantial risk of serious harm to Plaintiff. Plaintiff does not allege that he or anyone else alerted Defendant Hopkins that certain inmates posed a substantial risk to his safety. Absent such allegations, the court concludes that Plaintiff has failed to state a claim against Defendant Hopkins.

C. Sheriff Dailey

Neither Plaintiff's complaint nor his response to Defendants' motion to dismiss contains any allegation or mention of Defendant Dailey. To the extent that Plaintiff is attempting to advance a claim against Defendant Dailey in his role as supervisor of the Wyandotte County Detention Center, the court notes merely that supervisor status alone is insufficient to support a

claim under § 1983. Mitchell v. Maynard, 80 F.3d 1433, 1441 (10th Cir. 1996) (citing Rizzo v. Goode, 423 U.S. 362, 376 (1976)). A plaintiff must still allege personal involvement on the part of the supervisor. Id. (citations omitted). Because Plaintiff in this case has failed to make any such allegations against Defendant Dailey, the court concludes that Plaintiff has failed to state a claim against him.

IT IS, THEREFORE, BY THE COURT ORDERED that Defendants' motion to dismiss or, in the alternative, for summary judgment (Doc. 19) is granted.

The case is closed.

Copies of this order shall be transmitted to pro se Plaintiff and counsel of record for Defendants.

IT IS SO ORDERED.

Dated at Kansas City, Kansas, this 8th day of August 2003.

s/ G. Thomas VanBebber
G. Thomas VanBebber
United States Senior District Judge